

Washington University Global Studies Law Review

Volume 16 | Issue 1

2017

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Recommended Citation

Lauren Verseman, *Corporate Social Responsibility: Are Franchises off the Hook, or Can a Treaty Catch Them?*, 16 WASH. U. GLOBAL STUD. L. REV. 221 (2017),
https://openscholarship.wustl.edu/law_globalstudies/vol16/iss1/10

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CORPORATE SOCIAL RESPONSIBILITY: ARE FRANCHISES OFF THE HOOK, OR CAN A TREATY CATCH THEM?

I. INTRODUCTION

In July 2015, the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (the “Working Group”) held its first meeting to discuss the elaboration of a binding international treaty on business and human rights.¹ These initial treaty discussions follow a long line of work by United Nations entities and others in the area of business and human rights. The discussions build on both the State’s responsibility to promote and protect human rights and the business enterprise’s responsibility to respect those rights.² As U.N. Human Rights Council Resolution 26/9 prescribed, the first session was devoted primarily to “constructive deliberations on the content, scope, nature and form of the future international instrument.”³ Among other topics, participants debated about which types of business arrangements would be targeted by a future treaty—would a future treaty target only Multinational Corporations (MNCs), or would such a treaty also target other types of business arrangements?⁴

Although much of the business and human rights literature focuses on the responsibilities of MNCs or Transnational Corporations (TNCs),⁵ other types of business arrangements may also have human rights impacts. John Ruggie, former Special Representative for Business and Human Rights to the UN Secretary-General, has noted that corporations are increasingly structured like a “bundle of contracts”—suppliers, franchise arrangements,

1. The IGWG was established in June 2014 by United Nations Human Rights Council Resolution 26/9 to elaborate on an international legally binding instrument on human rights and business. United Nations Human Rights Council, Open-Ended Intergovernmental Working Group On Transnational Corporations and Other Business Enterprises with Respect To Human Rights, <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx>.

2. U.N. Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9 (July 14, 2014).

3. *Id.*

4. Draft Rep. of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights §§ 53, 77 (July 10, 2015).

5. See generally David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT’L L. 901 (2003); Anniki L. Laine, *Integrated Reporting: Fostering Human Rights Accountability for Multinational Corporations*, 47 GEO. WASH. INT’L L. REV. 639 (2015).

and joint ventures.⁶ Franchise operations, in particular, range across a wide variety of industries, from education services to convenience stores to home health care.⁷ International franchises are prominent in a number of business sectors: many well-known international brands operate in whole or in part through a franchise structure. Hotel chains like Choice,⁸ Marriott,⁹ and Intercontinental¹⁰ are commonly operated as franchises. Fast food companies, like McDonald's¹¹ and food and beverage companies like Coca-Cola,¹² are also prominent examples of franchises operating internationally on a large scale. The sectors in which the franchisors operate are also sectors that touch a variety of human rights issues: hotels can be hotspots for human trafficking,¹³ retail operations can be a site of labor disputes,¹⁴ and bottling agreements can deplete scarce local resources, most notably water.¹⁵ These conflicts underscore that franchise

6. John Ruggie, *Closing Plenary Remarks at the Third United Nations Forum on Business and Human Rights*, (Dec. 3, 2014), http://www.ohchr.org/Documents/Issues/Business/ForumSession3/Submissions/JohnRuggie_SR_SG_BHR.pdf.

7. Examples include 7-Eleven, Inc., Kumon Math and Science Centers, and Home Helpers, a home health care service for seniors. For a more comprehensive list, see International Franchise Association, <http://www.franchise.org> (search: international opportunities) (last visited Nov. 8, 2015).

8. CHOICE HOTEL FRANCHISE OPPORTUNITIES, <http://www.choicehotelsdevelopment.com/> (last visited Feb. 9, 2016).

9. Marriott offers both franchise and management options. MARRIOTT HOTEL DEVELOPMENT, <https://hotel-development.marriott.com/> (last visited Feb. 9, 2016).

10. Intercontinental reports that it operates over 4,900 hotels under franchise agreements. INTERCONTINENTAL HOTEL GROUP, <http://development.ihg.com/> (last visited Feb. 9, 2016).

11. The title to the page, "Welcome to McFranchise," highlights the degree to which the franchise arrangement is part of the corporate identity and model. McDonald's Corporation, <http://www.aboutmcdonalds.com/mcd/franchising.html> (last visited Feb. 12, 2016).

12. Coca-Cola employs independent bottling franchises for most of its products. COCA-COLA COMPANY, <http://www.coca-colacompany.com/our-company/the-coca-cola-system/> (last visited Feb. 13, 2016); see also Richard Feloni, *Coca-Cola Isn't One Giant Corporation—It's A System Of Almost 275 Companies*, Business Insider (June 22, 2015), <http://www.businessinsider.com/inside-coca-cola-franchise-system-2015-6>.

13. See POLARIS PROJECT, *HUMAN TRAFFICKING IN THE HOTEL INDUSTRY*, <https://polarisproject.org/sites/default/files/human-trafficking-hotel-industry.pdf>.

14. 7-Eleven: *Investigation Exposes Shocking Exploitation of Convenience Store Workers*, SYDNEY MORNING HERALD (Aug. 29, 2015), <http://www.smh.com.au/business/workplace-relations/7eleven-investigation-exposes-shocking-exploitation-of-convenience-store-workers-20150828-gja276.html>.

15. Local leaders in Colombia estimate that a Coca-Cola bottling plant "consumes approximately 1.68 million cubic meters of water, constituting 68.5 percent of the entire municipality's water consumption." Lisa Taylor, *Coca-Cola's New Bottling Plant Threatens Workers' Rights in Colombia*, LATIN CORRESPONDENT (July 1, 2015), <http://latincorrespondent.com/2015/07/coca-colas-new-bottling-plant-threatens-workers-rights-colombia/>. Coca-Cola has also recently suspended bottling at three plants in India. Katy Daigle, *Coke Suspends Bottling at Plant at Center of Water Dispute*, ASSOCIATED PRESS (Feb. 12, 2016), <http://www.seattletimes.com/business/coke-suspends-bottling-at-plant-at-center-of-water-dispute/>.

operations, like other business entities, have human rights impacts in the countries and communities in which they operate.

In response to calls for greater responsibility in the face of corporate human rights impacts, many companies have publicly adopted human rights or anti-human trafficking policies or both, with some incorporating outside frameworks like the UN Guiding Principles on Business and Human Rights.¹⁶ While companies that operate international franchises may have human rights policies, these companies sometimes add a disclaimer to their policies explaining that, due to the nature of their franchise agreements, conditions may vary by location.¹⁷ These disclaimers are especially common in labor and employment provisions.¹⁸ While it is difficult to enforce international human rights laws against traditional, vertically integrated multinational corporations (MNCs),¹⁹ these kinds of alternative, contract-based arrangements add another level of complexity to human rights protection regimes.

In the current human rights compliance landscape, a company like McDonald's can pledge to serve sustainably sourced beef at its restaurants worldwide but at the same time decline to require policies that ensure employees at McDonald's franchise locations are not subject to unfair labor practices, human rights abuses, or even human trafficking.²⁰ This

16. Some companies that reference the Guiding Principles include PepsiCo, Nestlé, and Toshiba. PEPSICO, <http://www.pepsico.com/Purpose/Talent-Sustainability/Human-Rights>; Nestlé, http://www.nestle.com/asset-library/Documents/Library/Documents/Corporate_Governance/Corporate-Business-Principles-EN.pdf; Toshiba, http://www.toshiba.co.jp/csr/en/performance/social/human_rights.htm. For a more complete list of companies that have adopted human rights policies, see the Business and Human Rights Resource Centre's (BHRRC) list of company policy statements on human rights. Business and Human Rights Resource Centre, <http://business-humanrights.org/en/company-policy-statements-on-human-rights>.

17. "More than 80% of McDonald's restaurants are owned and operated by independent Franchisees. The Company expects its Franchisees to maintain high standards of integrity and to abide by all applicable laws and regulations, including laws regarding human rights, dignity and respect, workplace safety, and worker compensation and treatment. *Ultimately, Franchisees define and implement people practices in their local restaurants.*" McDonald's Corporate Social Responsibility & Sustainability Report 81 (2012–2013) (Emphasis added), http://www.aboutmcdonalds.com/content/dam/AboutMcDonalds/2.0/pdfs/2012_2013_csr_report.pdf.

18. "Because of our franchise structure and the number of locations where McDonald's operates, people policies may differ. Labor standards also vary considerably across the countries and markets where we operate, requiring different approaches to people issues and practices." McDonald's Corporation, *Responses to the BHRRC survey on human rights practices*, Business and Human Rights Resource Centre, <http://business-humanrights.org/en/mcdonalds-0> (last visited Feb. 12, 2016).

19. See generally David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931 (2004); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 526–30 (2001); John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT'L L. 819 (2007).

20. Regarding supply chain management, McDonald's CSR report says:

paper will explore the duty of business enterprises to respect human rights. It will then discuss the efforts to define the scope of a business and human rights treaty in the face of the “bundle of contracts”—the structures of many business entities, specifically franchise arrangements. Finally, it will argue that a treaty covering the duties of franchises could have conflicting results: a treaty could provide more stability to the ever-evolving set of national franchise liability laws and perhaps encourage countries to open their courts to human rights claims against business entities. At the same time, increasing the possibility of liability could justify franchise fears about voluntarily implementing human rights policies and may ultimately incentivize innovation in corporate reorganization to escape treaty coverage instead of promoting corporate respect of human rights.

II. THE GUIDING PRINCIPLES AND DUTY OF BUSINESS TO RESPECT HUMAN RIGHTS

The relationship between business and human rights has been a topic of intense inquiry and concern for some time,²¹ and many companies have responded with some degree of human rights policy.²² The Guiding Principles on Business and Human Rights have been a major catalyst for the transmission of business and human rights norms and the increased recognition of corporate responsibility in the area of human rights.²³ They are principles that have been developed to guide companies on human rights issues and to establish best practices; notably, the Guiding Principles are applicable to all business enterprises regardless of size or home country.²⁴ The Guiding Principles call on business enterprises to meet their duty to respect human rights by developing a policy regarding human rights, a due diligence process, and a remediation process to

We are responsible for influencing and reinforcing these three Es [Ethics, Environment, Economics] at each level of our supply chain: raw material production, processing, and distribution. Among other things, this means working with suppliers to innovate and implement best practices for sustainable ingredients, requiring that our suppliers protect human rights in the workplace, and safeguarding food quality and safety through best practices in animal health and welfare.

MCDONALD’S, *supra* note 17, at 35. Contrast this with the company’s statement about labor in franchise stores, MCDONALD’S, *supra* note 18.

21. Kinley & Tadaki, *supra* note 19, at 935.

22. BHHRC, *supra* note 16.

23. United Nations Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations “Respect, Protect and Remedy” Framework, iv (2011), HR/PUB/11/04, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

24. *Id.* at 1.

address any violations that surface during their performance of due diligence.²⁵

The Guiding Principles are based on the UN “Protect, Respect, and Remedy” framework, which discusses three pillars necessary to support human rights.²⁶ “Protect” in this context applies to States: State actors have the duty to protect human rights through policies, legislation, regulation, and adjudication.²⁷ This is not identical to the duty of corporations, which according to the Guiding Principles is to “respect” human rights, meaning they will “avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”²⁸ Nonetheless, the Guiding Principles seek to explicitly create a duty for businesses to respect human rights, with the view of providing remedies for breach of that duty.²⁹

The Guiding Principles are an example of soft law—they are not binding, but have been broadly accepted and implemented by state and non-state actors.³⁰ Since their endorsement, many companies have incorporated the Guiding Principles into their corporate social responsibility (CSR) policies.³¹ Likewise, investors³² have used the

25. These elements are aimed at ensuring companies “know and show that they respect human rights.” *Id.* at 13. The Guiding Principles then go on to discuss in more depth the operational principles involved in the policy, due diligence, and remediation requirements. *Id.* at 16–26.

26. *Id.* [http://www.hbsslaw.com/Templates/media/files/08-27-15 \(Dkt 1\) Complaint for Violation of California Consumer Protection Laws \(2\).PDF](http://www.hbsslaw.com/Templates/media/files/08-27-15%20(Dkt%201)%20Complaint%20for%20Violation%20of%20California%20Consumer%20Protection%20Laws%20(2).PDF).

27. *Id.* at 3.

28. *Id.* at 17.

29.

State-based judicial and non-judicial grievance mechanisms should form the foundation of a wider system of remedy. Within such a system, operational-level grievance mechanisms can provide early stage recourse and resolution. State-based and operational-level mechanisms, in turn, can be supplemented or enhanced by the remedial functions of collaborative initiatives as well as those of international and regional human rights mechanisms.

Id. at 28.

30. For a discussion of “soft law” instruments dealing with corporations and human rights, see Ratner, *supra* note 19.

31. See, e.g., COCA-COLA.

In 2011, The Coca-Cola Company formally endorsed the UN Guiding Principles on Business and Human Rights This framework is a key touchstone for our policies and programs related to workplace and human rights. We expect our Company, bottling partners and suppliers to avoid causing, or contributing to, adverse human rights impacts as a result of business actions. Furthermore, our Company, bottling partners and suppliers are responsible for preventing or mitigating adverse human rights impacts directly linked to their operations, products or services by their business relationships.

The Coca-Cola Company, *Human and Workplace Rights*, <http://www.coca-colacompany.com/our-company/human-workplace-rights/>.

32. Many institutional, faith-based, and socially responsible investment asset managers engage in shareholder advocacy as part of a socially responsible investment plan. One advocacy tool is filing

Guiding Principles as a model for reforms they ask of companies.³³ Many countries, including the U.S., are developing National Action Plans for implementing the Guiding Principles.³⁴ International organizations like the Group of 7 (G7) and the Organization for Economic Cooperation and Development (OECD) have endorsed the Guiding Principles.³⁵ Reporting mechanisms have recently been developed with an initial focus on governance and corporate policies.³⁶ These mechanisms do not, however, discuss how different corporate structures impact implementation.³⁷ The Guiding Principles themselves apply to any corporate form: they are not limited to traditional MNCs and so, would ostensibly cover franchises. Although they are cast in broad language, they do not deal with the liability issues and incentives specific to franchise agreements.

shareholder resolutions seeking changes in corporate policy. UN WORKING GROUP ON BUSINESS AND HUMAN RIGHTS, *Statement Concerning Shareholder Resolutions Requiring Companies To Perform Human Rights Due Diligence* (May 13, 2013), http://business-humanrights.org/sites/default/files/media/documents/13_05_13_wg_statement_shareholder_resolutions_and_hr_due_diligence.pdf.

33. For example, a shareholder proposal filed at McDonald's read as follows: "RESOLVED, that shareholders of McDonald's Corporation ("McDonald's") urge the Board of Directors to report to shareholders, at reasonable cost and omitting proprietary information, on McDonald's process for identifying and analyzing potential and actual human rights risks of McDonald's operations (including restaurants owned and operated by franchisees) and supply chain," and, in the supporting statement, "[t]he importance of human rights risk assessment is reflected in the United Nations Guiding Principles on Business and Human Rights (the "Ruggie Principles") approved by the UN Human Rights Council in 2011." McDonald's Corp., Proxy Statement 48, 49 (Apr. 12, 2013), <http://www.sec.gov/Archives/edgar/data/63908/000119312513152413/d472792ddef14a.htm>. A similar resolution was filed the same year at Halliburton. Halliburton Corporation, Proxy Statement 70 (Apr. 2, 2013), http://www.sec.gov/Archives/edgar/data/45012/000004501213000131/hal_2013-proxy.htm#s759C71D47A05A7F70DC52AA53FB3459B.

34. Business and Human Rights Resource Centre: National Action Plans, <http://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans-2002> (last accessed Feb. 12, 2016).

35. The G7 issued a statement in support of Guiding Principles. Sarah A. Altschuller, *G7 Leaders Issue Declaration Supporting Private Sector Implementation of Human Rights Due Diligence*, CSR AND THE LAW (June 15, 2015), <http://www.csrandthelaw.com/2015/06/15/g7-leaders-issue-declaration-supporting-private-sector-implementation-of-human-rights-due-diligence/>. The OECD also issued a statement in support. ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, RECOMMENDATION OF THE COUNCIL ON COMMON APPROACHES FOR OFFICIALLY SUPPORTED EXPORT CREDITS AND ENVIRONMENTAL AND SOCIAL DUE DILIGENCE, <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=tad/ecg%282012%295&doclanguage=en>.

36. The organizations Shift and Mazars have collaborated on a reporting framework. UNITED NATIONS GUIDING PRINCIPLES REPORTING FRAMEWORK, <http://www.ungpreporting.org/> (last visited Feb. 11, 2016).

37. *Id.*

III. TO CONTROL OR NOT TO CONTROL? THE PROBLEM OF FRANCHISES

Alongside the development of the Guiding Principles and the related implementation tools that have emerged, many corporations have established human rights policies that address labor policies, human trafficking, rights of children, the right to water, and political speech. Franchise operations have consequences for human rights, especially in the area of labor rights. Corporate human rights policies are increasingly aimed at modern-day slavery and human trafficking.³⁸ The latter has been especially important in the hotel industry, with organizations like ECPAT³⁹ working with companies to draft and implement policies with the aim of preventing sex trafficking, particularly of children.⁴⁰ Some franchise hotels have taken steps toward human rights policies, even though the implementation may be constrained by their franchise model. Choice, for example, has a human rights policy and provides training to its corporate employees, as does Intercontinental.⁴¹

Many corporations that operate a franchise model also have a human rights policy in place, but under the caveat that it may not be able to implement it in its franchise relationships. McDonald's is one example.⁴²

38. A body of law is developing the United States around trafficking, but this is outside the scope of this paper. All 50 states have implemented some kind of trafficking legislation. Erin N. Kauffman, Comment, *The Uniform Act on Prevention of and Remedies for Human Trafficking: State Law and the National Response to Labor Trafficking*, 41 J. LEGIS. 291, 292 (2015). In August 2015, some of the first lawsuits using California supply chain law were filed against Costco and Nestlé for alleged human trafficking and modern-day slavery in their seafood supply chains, notably in Thai fishing operations. Class Action Complaint, *Barber v. Nestle USA Inc.*, 15-cv-01364 (C.D. Cal. 2015), https://www.hbsslaw.com/uploads/case_downloads/slave_labor/nestle_complaint.pdf (last accessed Nov. 8, 2015); *Sud v. Costco Wholesale Corp.*, 15-cv-03783, (N.D. Cal. 2015), http://www.cpmlegal.com/media/news/222_Costco%20Prawns%20Complaint.pdf (last accessed Nov 8, 2015).

39. ECPAT is a network of local civil society organizations and coalitions with that work to end the sexual exploitation of children around the world. ECPAT INTERNATIONAL, <http://www.ecpat.org/about-ecpat>.

40. ECPAT has developed a code of conduct for hotels aimed at preventing child sex tourism and sex trafficking. ECPAT INTERNATIONAL, <http://www.ecpatusa.org/code> (last visited Nov. 8, 2015).

41. Choice's human rights policy is illustrative. It contains provisions for both the rights of children and the rights of employees, saying, "Choice Hotels condemns all forms of exploitation of children. The Company does not recruit child labor, and support laws duly enacted to prevent and punish the crime of sexual exploitation of children. Choice Hotels will work to raise awareness concerning such exploitation, and will cooperate with law enforcement authorities to address any such instances of exploitation of which the Company becomes aware," and "Choice Hotels supports and upholds the elimination of discriminatory practices with respect to employment and occupation, and promotes and embraces diversity in all aspects of its business operations. Choice Hotels further supports the elimination of all forms of forced, bonded or compulsory labor and the freedom of association." CHOICE HOTELS INTERNATIONAL, INC., *Human Rights Policy Statement*, <https://www.choicehotels.com/about/diversity/human-rights>.

42. MCDONALD'S, *supra* note 18.

Coca-Cola has itself recently pointed out the lack of control it currently exercises over its franchisees: in many of their global operations, the bottles and trucks say Coca-Cola, but they have no control over what's actually happening.⁴³ People on the ground see the corporate logo and brand, and for practical purposes do not separate the franchisor from the franchisee.⁴⁴ This puts franchisors in the position of disavowing control over the practices of its franchisees while still being associated in the popular mind with human rights risk in franchisee operations. Faced with this dilemma, a franchisor might wish to influence franchisee behavior, but may also hold back because of the particular nature of the franchise relationship.⁴⁵

McDonald's has flagged the franchise agreement as a barrier to implementing human rights policies. McDonald's adopted a human rights policy in 2014, but with the caveat that it could not impose the policy on franchisees. Specifically, McDonald's reports that:

Because of our franchise structure and the number of locations where McDonald's operates, people policies may differ. Labor standards also vary considerably across the countries and markets where we operate, requiring different approaches to people issues and practices. . . . More than 80% of McDonald's restaurants are owned and operated by independent franchisees . . . Ultimately, franchisees define and implement people practices in their locally-operated restaurants.⁴⁶

43. Brent Wilton, *How Respecting Human Rights Protects Our Brands*, Press Release, http://www.einnews.com/pr_news/286891039/brent-wilton-how-respecting-human-rights-protects-our-brands.

44. If Coca-Cola were describing U.S.-based operations, this statement could lay the basis for a claim of liability based on apparent agency. See *Bartholomew v. Burger King Corp.*, 15 F. Supp.3d 1043, 1050 (D. Haw. 2014).

45. For one possible model for a franchisor/franchisee best practices guide, see Business for Social Responsibility's (BSR) guidelines for licensors. This is one of the few in-depth examples available. BSR, *GOOD PRACTICES FOR COMPLYING WITH LICENSORS' SOCIAL AND ENVIRONMENTAL REQUIREMENTS* (2011), <http://www.bsr.org/en/our-insights/report-view/good-practices-for-complying-with-licensors-social-and-environmental-require>.

46. Business & Human Rights Resource Centre, *McDonald's Company Action Plan Survey Response*, <https://business-humanrights.org/en/mcdonalds-0?issues%5B%5D=11245>. In 2014, the Business & Human Rights Resource Centre contacted 180 companies asking them to provide information on their policies & practices on human rights. The survey questions can be found at <https://business-humanrights.org/en/company-action-platform-survey-questions-in-9-languages>. Supplier contracts even contain employment provisions. For example: "The Supplier Code of Conduct outlines our expectation that every McDonald's supplier will comply with all labor laws and with our own standards for minimum work ages and conditions of employment." McDonald's Corporate Social Responsibility & Sustainability Report 81 (2012–2013) (http://www.aboutmcdonalds.com/content/dam/AboutMcDonalds/2.0/pdfs/2012_2013_csr_report.pdf).

At the same time, McDonald's has developed "guiding principles" for its supplier contracts, including a workplace accountability audit program.⁴⁷ This begs the question: Why are contracts dealing with ingredients and durable goods subject to greater scrutiny than contracts that deal with human beings who are working in an establishment with the company name on it?

The discussion around what kinds of business relationships should be covered under a prospective treaty highlights that, although it sounds like a broad term, "corporate responsibility" in its current form may not reach all of the actors that may influence or violate human rights policies. Although NGOs, working groups, and activists have all identified corporate structure as a major barrier to access to remedies for human rights abuses,⁴⁸ much of the focus has been on human rights practices in company supply chains, not in licensing or franchising agreements. However, franchise arrangements also pose a liability problem as individuals try to file human rights claims.⁴⁹ The State of Play report on corporate responsibility and human rights, produced by the Institute for Human Rights and Business (IHRB) and The Global Business Initiative on Human Rights (GBI), identifies franchising and licensing arrangements as source of human rights risk for companies, and notes that franchise arrangements pose challenges distinct from those in supplier agreements.⁵⁰

Generally, the franchise relationship consists of two legally independent businesses that are nonetheless symbiotic and interdependent.⁵¹ Because of this close relationship, parties often try to establish that the franchisor (who frequently has deeper pockets) is

47. MCDONALD'S, *Supplier Code of Conduct*, https://www.aboutmcdonalds.com/content/dam/AboutMcDonalds/Sustainability/Library/Supplier_Code_of_Conduct.pdf.

48. Amnesty International discussed this at length in its 2014 report on remedies available for human rights abuses, noting that:

These networks of entities and arrangements, and the way in which they interrelate, can be transparent or highly opaque . . . an individual affected by the operations of entities involved in these networks or arrangements would face additional difficulties in obtaining a remedy. Lines of command and control within and between the arms of the multinational corporation are often obscure and deliberately blurred.

Injustice Incorporated: Corporate Abuses and the Human Right to Remedy, AMNESTY INTERNATIONAL, 115 (2014), <https://www.amnesty.org/en/documents/pol30/001/2014/en/>. Although it mentions franchises, most of its analysis focuses on parent company liability in multinationals. *Id.* at 115–18.

49. *State of Play: The Corporate Responsibility to Respect Human Rights in Business Relationships*, Global Business Initiative on Human Rights and Institute for Human Rights and Business (2012), <http://www.ihrb.org/pdf/state-of-play/State-of-Play-Full-Report.pdf>.

50. *Id.*

51. Gregg Rubenstein, Francesca Turitto, Penny Ward & Larry Weinberg, *Vicarious and Other Franchisor Liability*, 9 INT'L J. FRANCHISING L. 3 (2011).

vicariously liable for the actions of the franchisee.⁵² Different countries approach the issue of franchisor liability differently, which is increasingly important as franchise operations expand internationally.⁵³

“The franchisor-franchisee relationship is unique in that it has characteristics of both an arm’s length business transaction as well as an ongoing business relationship.”⁵⁴ The interests of franchisors and franchisees do not always align, and human rights violations may be an emerging area where this is especially true. The franchisor has an interest in protecting its brand and controlling negative publicity, whereas the franchisee seeks to maximize the profitability of his own business; public relations damage to the brand as a whole may be more far-reaching than the damage to the individual owner who engages in questionable labor or other human rights practices. The recent scandal of 7-11 franchises in Australia provides an example: a media investigation uncovered that the owners of several franchises were not adequately compensating employees and even running fraudulent visa schemes out of 7-11 stores.⁵⁵ A former Australian 7-11 “Franchisee of the Year” was even operating a consulting business for other 7-11 franchisees just days after being fined for underpaying his workers.⁵⁶ Company representatives from 7-11 were called to testify before the Australian Senate to respond to accusations of widespread wage exploitation across its franchises.⁵⁷ In these examples, the actions of the franchisees to maximize their own profits by cutting corners on labor and human rights practices jeopardized the 7-11 franchisor’s brand in the Australian market.

U.S. courts have confirmed that U.S. franchisors can escape liability for their franchisees’ actions abroad. The case of *Sinaltrainal v. Coca-Cola, Co.* provides an example of a franchise arrangement preventing access to a remedy for alleged international human rights abuses.⁵⁸

52. *Id.*

53. *Id.* See *supra* note 7 for examples of international franchises.

54. Norman D. Bishara & Cindy A. Schipani, *A Corporate Governance Perspective on the Franchisor-Franchisee Relationship*, 19 STAN. J.L. BUS. & FIN. 303 (2013–2014).

55. Adele Ferguson & Sarah Danckert, *7-Eleven Workers Pay up to \$70,000 for Visa in Indentured Labor Scheme*, SYDNEY MORNING HERALD, Sept. 23, 2015, <http://www.smh.com.au/business/7eleven-workers-pay-up-to-70000-for-visa-in-indentured-labour-scheme-20150923-gjsxzh.html#ixzz3nNIW1dzV>.

56. *Id.*

57. *Id.*

58. *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345 (S.D. Fla. 2003). The plaintiff, Sinaltrainal, is a Colombian agricultural labor union. SINALTRAINAL, <http://www.sinaltrainal.org/>. It is interesting to note that even though this case was decided in 2003, issues in the area persist. A Mexican franchise of Coca-Cola remains under fire in Colombia for its anti-union labor practices, including allegations of continued association with armed groups. Taylor, *supra* note 15. In April,

Sinaltrainal involved a Coca-Cola bottling operation in Colombia.⁵⁹ The plaintiff, a Colombian labor union, alleged that the Colombian bottler collaborated with paramilitaries, resulting in the death of several union workers.⁶⁰ *Sinaltrainal* brought a claim in U.S. District Court under the Alien Tort Claims Act.⁶¹ The plaintiff claimed that the bottling agreement, a form of franchise agreement, established that Coca-Cola controlled the bottling operation.⁶² The court looked at the franchise agreement and held that Coca-Cola “did not have a duty to monitor, enforce or control labor policies at a bottling plant.”⁶³ The only standards the agreement imposed related to protecting the Coca-Cola product itself in the market place; it did not impose any duty related to labor practices.⁶⁴ The court dismissed the case for lack of subject matter jurisdiction because the plaintiff failed to establish that Coca-Cola acted jointly with the bottler in the violation of international law.⁶⁵

Sinaltrainal highlights the problem franchise agreements pose in the scheme of remedies for human rights: even if the underlying claim is admissible in U.S. courts, a franchise agreement has been held to be insufficient to establish liability for the actions of the franchisee that violate international human rights law. Franchises and other corporate forms may be gaining popularity precisely because they create a web of contracts that obscures the controlling relationships that could be used to establish liability.

Some have proposed a redefinition of the duties owed in the franchisor-franchisee relationship, suggesting that it be modeled off a fiduciary relationship like that developed to prevent agency problems in corporate governance generally.⁶⁶ This could be a promising approach in the field of CSR, and human rights in particular. If a corporate franchisor like McDonald’s or Coca-Cola publically declares its approach to protecting human rights, it would not be unreasonable to expect that a franchisee would not do anything to harm or undermine that stated corporate policy. A fiduciary relationship could encourage compliance, but would likely be

union members went on a hunger strike to demand changes in company policy. *Trabajadores de Coca Cola en Huelga de hambre*, Apr. 13, 2015, <http://www.sinaltrainal.org/index.php/empresas20/coca-cola18/4377-trabajadores-de-coca-cola-en-huelga-de-hambre>.

59. *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345.

60. *Id.* at 1349.

61. *Id.* at 1348.

62. *Id.* at 1354.

63. *Id.*

64. *Id.*

65. *Id.* at 1360.

66. Bishara & Schipani, *supra*, note 54, at 323.

met with resistance as it would also change the very nature of the franchise relationship and the liability structure on which franchise operations have come to rely.

Without restructuring franchises altogether, is there any incentive for franchises to develop human rights regimes? Current efforts to develop norms and rules governing corporate responsibilities in protecting human rights have relied primarily on voluntary compliance measures (often developed internally) and soft law instruments (developed on the international level).⁶⁷ There is no binding state or international law that mandates companies to adopt or implement a human rights policy, yet many do, which indicates that there is likely some incentive or benefit to the company in doing so.

One possible explanation is simple self-interest: there may be a strategic advantage to adopting various corporate social responsibility programs. Companies “have been increasingly motivated by recognition of the potential economic value of sustainable business practices.”⁶⁸ In the area of environmental sustainability, this argument is more clear: reducing waste and fuel consumption, conserving resources, and focusing on efficiency can provide tangible cost savings when it comes to materials and utilities.⁶⁹

In the area of human rights, however, the correlation between corporate profitability and human rights is not as clear. Presumably, inexpensive labor is a boon for companies, and protecting labor and human rights may cost more than it saves.⁷⁰ Although conservation of resources is not at play

67. In Canada, soft and hard laws are informing each other. “These claims rest on a theory that international norms such as the UN Guiding Principles on Business and Human Rights form a standard of care that, when violated, constitutes actionable negligence. These “norms” were previously regarded as nonbinding “soft law,” but the Canadian developments could transform them into binding “hard law” enforceable through awards of civil damages. The practical effects of this trend include a growing effort to use Canada as a forum for redressing alleged human rights violations committed overseas, and an emphatic need for employers to consider developing and implementing effective codes of conduct for their supply chains.” John Kloosterman, Sari Springer, Trent Sutton & Lavanga Wijekoon, *In Canada, Foreign Workers Seek to Use International Norms as the Standard of Care in Negligence Claims Against Multinationals Operating Overseas*, JD SUPRA, 9/16/2015, <http://www.jdsupra.com/legalnews/in-canada-foreign-workers-seek-to-use-77833/> (last visited Nov. 8, 2015).

68. Stephen Kim Park & Gerlinde Berger-Walliser, *A Firm-Driven Approach to Global Governance and Sustainability*, 52 AM. BUS. L.J. 255, 272 (2015).

69. Wal-Mart, for example, was able to save over \$200 million in 2009 by reducing packaging and making delivery routes more efficient. Michael E. Porter & Mark R. Kramer, *Creating Shared Value*, 89 HARVARD BUS. REV. 62, 69 (2011); see also, E. Lynn Grayson & Gary P. Kjelleren, *The Business Case for Environmental Sustainability*, BUS. L. TODAY (Jan. 2015), http://www.americanbar.org/publications/blt/2015/01/03_grayson.html.

70. Concerns have been raised “that rather than reduce risks for companies, human rights due diligence could actually increase a company’s risks of liability.” John F. Sherman, III & Amy Lehr,

in human rights, like with environmental sustainability strong human rights policies can have an effect on company reputation,⁷¹ with responsible sourcing contributing to a “better public image and . . . stronger community relations.”⁷²

A more salient concept for human rights due diligence may be risk management, not cost savings.

MNCs not only bear legal risks associated with managing their supply chains, but may also face heightened reputational risks arising from legal or ethical violations committed by their suppliers abroad, such as pollution, sweatshops, and child labor. In order to manage and mitigate these legal and reputational risks, MNCs incorporate terms in supply chain contracts and supplier codes of conduct that require their suppliers to use global environmental and social standards more stringent than local law and implement monitoring systems to ensure compliance by suppliers with these terms.⁷³

Traditional MNCs have some incentive to voluntarily engage in CSR, as shown by the numerous examples of corporate human rights policies throughout this paper.⁷⁴ Most MNCs can securely develop human rights policies because they either unequivocally have control over their employees and operations or because under traditional corporate law their business structures solidly shield them from liability.⁷⁵ Franchisors, on the other hand, may actually risk exposing themselves to liability by requiring franchisees to implement corporate human rights policies: telling a franchisee how it must treat its employees, what kind of ongoing training

Human Rights Due Diligence: Is It Too Risky? Corporate Social Responsibility Initiative Working Paper No. 55. 4 (2010), Harvard University John. F. Kennedy School of Government, http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_55_shermanlehr.pdf.

The counter argument has so far been that “human rights due diligence enables a company to identify potential human rights risks and address them before they occur, which should reduce the company’s exposure to litigation of all kinds, and help the company defend against human rights claims that might be filed.” *Id.*

71. Moreover, “[c]orporate directors are being held more accountable for the effects of their decisions on the environment and society.” Janet E. Kerr, *Sustainability Meets Profitability: The Convenient Truth of How the Business Judgment Rule Protects A Board’s Decision to Engage in Social Entrepreneurship*, 29 CARDOZO L. REV. 623, 634 (2007).

72. Park & Berger-Walliser, *supra* note 68, at 274.

73. *Id.* at 283.

74. *Supra* note 16. See also CDP SUPPLY CHAIN PROGRAM, <https://www.cdp.net/supplychain> (last visited Feb. 14, 2016).

75. Amnesty International, *supra* note 48. See also Alan O. Sykes, *Corporate Liability for Extraterritorial Torts Under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 GEO. L.J. 2161 (2012).

to provide, could bring the franchisor closer to exercising control over the labor policies that could, themselves, harm the human rights of employees. If a meticulous food preparation policy can establish control over a hamburger, it is possible that courts could find that comprehensive human rights policies demonstrate adequate control over franchisee labor practices to render the franchisor liable for human rights infractions.⁷⁶

How franchises implement Human Rights policies is largely up to them.⁷⁷ As Christine Bader notes, “McDonald’s is already going through great lengths to ensure good working conditions in the other direction in its value chain,”⁷⁸ that is to say, in its supplier relationships.⁷⁹ Although companies might balk at requiring and enforcing human rights standards, this resistance is not due to lack of capacity but instead stems from the desire to minimize franchisor liability.⁸⁰ The question is not whether they *can* influence or control franchisees training, labor policies, or other areas of human rights concern, but whether they are willing to do so given the potential for liability any added levels of control over franchisee activities might create. Bader suggests that “McDonald’s should apply to franchisees a model similar to the one it uses for its suppliers,” including a compliance support team of “internal staff and independent auditors.”⁸¹ In the prescient words of Coca-Cola’s Director for Global Workplace Rights, “ultimately, it is a question of just getting started.”⁸² That is to say, the barriers lie with incentives, not with capacity.

76. See *Bartholomew v. Burger King Corp.*, 15 F.Supp.3d 1043 (D. Haw. 2014) (holding that Burger King’s detailed specifications as to preparation of the Whopper demonstrated significant control over instrumentality that caused harm to incur liability for the injury).

77. See Christine Bader, *McDonald’s Already Knows How to Manage Its Franchisee Labor Practices*, HARVARD BUS. REV. (July 31, 2014), <https://hbr.org/2014/07/mcdonalds-already-knows-how-to-manage-its-franchisee-labor-practices/>; see also, Bob Steinberger, *Protect Your Franchise from the Same Fate as McDonald’s*, HUFFPOST BUS. (Oct. 15, 2014), http://www.huffingtonpost.com/bob-steinberger/protect-your-franchise-fr_b_5980030.html.

78. Bader, *supra* note 77, at 1.

79. MCDONALD’S, *supra* note 20.

80. For example, to ensure uniformity throughout the world, all franchisees must use standardized McDonald’s branding, menus, design layouts and administration systems. The license agreement also insists the franchisee uses the same manufacturing or operating methods and maintains the quality of the menu items. *Id.* See MCDONALD’S, *Franchise agreement*, <http://www.sec.gov/Archives/edgar/data/1508478/000119312511077213/dex101.htm>.

81. Bader, *supra* note 77, at 2.

82. Ed Potter, *How to Implement the UN Guiding Principles on Business and Human Rights* (Oct. 2, 2013), <http://www.coca-colacompany.com/coca-cola-unbottled/how-to-implement-the-un-guiding-principles-on-business-and-human-rights/>.

IV. REMEDIES: FROM VOLUNTARY COMPLIANCE TO A BINDING INTERNATIONAL AGREEMENT

It is the Third Pillar—Remedy—that is both the most feared and the most underdeveloped of the Guiding Principles. It is also the pillar with the most direct capacity to change incentives and thus change behavior. The Guiding Principles themselves envisage access to courts as a remedy, but voluntary compliance programs and private regulation are other possible ways to shape corporate policy and behavior.⁸³ Legal remedy may, in fact, be a double edged sword in a system aimed at franchise organizations.

The landscape of remedies is patchwork and, arguably, inadequate.⁸⁴ Even in the current landscape, however, franchisors are hesitant to engage in private regulation for fear of incurring liability but at the same time none of the available instruments seem to allow parties who might experience human rights abuses at the hands of a franchisee any legal recourse. Private regulation has been embraced, but only insofar as it limits liability, creating a tension between binding instruments/remedies and voluntary compliance.⁸⁵ Corporations are willing to do some work on

83. Voluntary compliance and corporate self-regulation are not a panacea: “[t]he Achilles heel of self-regulatory arrangements to date is their underdeveloped accountability mechanisms.” John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT’L L. 819, 836 (2007). Although accountability mechanisms are slowly being developed, this criticism still holds. It may, however, be preferable to encourage participation in self-regulation in this period where judicial remedies are still developing.

84. Anna Grear & Burns H. Weston, *The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-Kiobel Landscape*, 15 HUMAN RIGHTS L. REV. 21. For a comparative report on access to remedies in the U.S. and internationally, see Gwynne Skinner, Robert McCorquodale & Olivier De Schutter, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*, Report prepared for the International Corporate Accountability Roundtable, CORE, and The European Coalition for Corporate Justice (Dec. 2013), available at <http://icar.ngo/wp-content/uploads/2013/02/The-Third-Pillar-Access-to-Judicial-Remedies-for-Human-Rights-Violation-by-Transnational-Business.pdf>. A recent report in the UK found that “the current access to a remedy in the UK for these types of claims is limited, with most of the non-judicial mechanisms unable to provide a remedy at all to the victims. Further, victims of such abuses, particularly abuses taking place overseas, face significant barriers.” Robert McCorquodale, *Survey of the Provision in the UK of Access to Remedies for Victims of Human Rights Harms Involving Business Enterprises* (July 17, 2015), http://corporate-responsibility.org/wp-content/uploads/2015/12/BIICL-McQuordale-uk_access_to_remedies.pdf.

85. This tension was visible as corporations struggled to respond to the Rana Plaza factory collapse in Bangladesh. Two different organizations were formed: the Alliance and the Accord.

In May 2013, about seventy retailers, including major European retailers such as H&M, Carrefour, Benetton, and Marks & Spencer, agreed to the Accord on Fire and Building Safety in Bangladesh, a plan, promoted by labor and consumer groups, to require inspections and to finance safety improvements in Bangladeshi garment factories. Most major U.S. retailers declined to join the plan, citing perceived risks of legal liability. . . .

their own, but the risk of liability may discourage them from implementing policies they might otherwise consider.

Because they see voluntary programs as only part of the solution and note that enforcement against private entities still not strong enough, human rights groups (and some States) are calling for a binding international instrument to address business and human rights.⁸⁶ Four years after the endorsement of the Guiding Principles, several states petitioned the UN OCHR to form a working group to explore the possibility of a binding international treaty on human rights and business.⁸⁷ At this time, there is no international consensus that a treaty is in fact needed: there is a popular soft law option in place, but many stakeholders felt the need for a tool that creates hard law remedies.⁸⁸

One area of heated debate is what kinds of business entities would be targeted by a business and human rights treaty. Some propose that the treaty target transnational corporations (TNCs), with the focus being specifically on the transnational character of their operations.⁸⁹ Even if TNCs are the primary target, a treaty that targets only TNCs and not companies acting domestically will miss large swaths of the economy in many countries. Although TNCs have a tremendous presence in many States, the victims of human rights abuses likely do not care whether a large TNC or a state-owned enterprise was the violator.

Some EU member states left the initial session: “some EU member states (Bulgaria, France, Italy, Latvia, Lichtenstein, Luxemburg, Netherlands, Sweden) and Switzerland participated initially in the IWG. However, after the second day they withdrew because their demand to widen the scope of the work beyond transnational corporations was

In July 2013, an alliance of seventeen major U.S. retailers including Wal-Mart, Gap, J.C. Penney, Macy’s, Target, Sears, Nordstrom, and L.L. Bean, announced their own plan, the Bangladesh Worker Safety Initiative.

John R. Crook, *U.S. Clothing Retailers Adopt Factory Safety Plan for Bangladesh*, 107 AM. J. INT’L L. 918, 919 (2013). See also Steven Greenhouse & Elizabeth A. Harris, *Battling for a Safer Bangladesh*, NEW YORK TIMES, Apr. 21, 2014, <http://www.nytimes.com/2014/04/22/business/international/battling-for-a-safer-bangladesh.html>.

86. Before the endorsement of the Guiding Principles, some thought legally binding instruments would not be forthcoming. Scott Jerbi, *Business and Human Rights at the UN: What Might Happen Next?*, 31 Hum. Rts. L.Q. 299 (2009).

87. UN Human Rights Council, *supra* note 2.

88. For a complete discussion and debate of the first round of treaty talks, see the blog series “Debate the Treaty” hosted by the Business and Human Rights Resource Center, <http://business-humanrights.org/en/about-us/blog/debate-the-treaty>.

89. UN Human Rights Council, *supra* note 2.

rejected.”⁹⁰ At this time there is no consensus on what kind of business entities should be targeted—developing countries seek protection for domestic companies, but EU States argue for any treaty to apply to all business entities, creating what would be an equal playing field of minimum standards for all businesses, including both TNCs and local domestic competitors.

In the context of franchising, there is some question whether the franchise structure would allow companies to skirt the “transnational” category.⁹¹ A company may be present in markets across the world through local owners and operators, perhaps making the link between the parent company and any on-the-ground activities so remote as to exempt the corporation from meeting the definition as a TNC.⁹²

Any treaty that narrowly defines the types of corporate entities that will be subject to enforcement would create a situation which would challenge corporate actors to create innovative structures to escape liability. Other stakeholders, including UN Special Representative on Business and Human Rights, have encouraged participants in the treaty talks to broaden the focus of the treaty to include as many different types of corporate structures as possible.⁹³ A treaty that targets only MNCs will not address any of the problems discussed above. Because franchises and human rights are not covered under standard legal instruments, there needs to be a treaty

90. INT’L ORG. OF EMP’RS, First Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights: Summary of Proceedings (July 13, 2015), http://www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/business_and_human_rights/EN/_2015-07-13_C-164_First_Session_of_the_IWG_on_TNCs_and_other_business_enterprises_on_human_rights_IOE_Summary_of_Proceedings.pdf; See also EUROPEAN COAL. FOR CORP. JUSTICE, UN Treaty on Business & Human Rights Negotiations Day 1—Divide Emerges Between EU and Other Delegations (July 7, 2015), <http://www.corporatejustice.org/UN-Treaty-on-Business-Human-Rights-negotiations-ECCJ-Daily-Summary.html>; for the EU contribution to the UN Treaty on Business & Human Rights Negotiations see UNITED NATIONS HUMAN RIGHTS COUNCIL OFFICE OF THE HIGH COMM’R, Written Contribution by European Union, <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session1/Pages/WrittenContributions.aspx>.

91. According to Black’s Law Dictionary, a multinational corporation is a “company with operations in two or more countries, generally allowing it to transfer funds and products according to price and demand conditions, subject to risks such as changes in exchange rates or political instability.” *Corporation*, BLACK’S LAW DICTIONARY (10th ed. 2014). *Nota bene* the definition dates back to 1960.

92. International regulation of franchises is not unprecedented. Despite what appears to be a loophole exempting franchise relationships from international law, there are treaties that do affect franchises. Copyright, patent, tax, and trade treaties all touch the franchise relationship, as does the United Nations Convention on the International Sale of Goods. John R. F. Baer, Dr. Karsten Metslaff, & Larry Weinberg, *International Treaties, Conventions, and Agreements Affecting Franchising*, 2 INT’L J. FRANCHISING L. 3 (2004).

93. Ruggie, *supra* note 6.

that specifically includes them.⁹⁴ In the end, any treaty should seek to avoid incentives for corporations to restructure to avoid liability by designing an instrument that encompasses all business entities and structures, and does not allow businesses to utilize loopholes by engaging in franchising or licensing.⁹⁵ That franchises could find themselves exempt is an example of the kind of weak access to remedies that a treaty would aim to address. This pillar cannot be fully realized if creative adaptation of the corporate form to avoid liability is allowed.

V. KIOBEL—THE ELEPHANT IN THE ROOM (WHAT GOOD IS A TREATY?)

Even if a treaty was to pass and franchises were included, access to remedies in the U.S. would be difficult after the *Kiobel v. Royal Dutch Petroleum* decision limited the kinds of cases that could be brought under the Alien Tort Statute (ATS).⁹⁶ Before *Kiobel*, the ATS seemed like a promising vehicle for human rights litigation against corporations,⁹⁷ and a business and human rights treaty could have provided another international law tool by which to bring these claims. But in *Kiobel*, the Supreme Court held that the ATS did not reach extraterritorially, contracting access to U.S. courts for individuals harmed in other countries by corporate activity. In *Kiobel*, Nigerian citizens brought suit in the U.S. for alleged abuses relating to local resistance of oil exploration. The Court did not rule on the merits of the violation of international law, instead analyzing the ATS and holding that the presumption against extraterritoriality applies to claims under the ATS.⁹⁸ The *Kiobel* decision sent shockwaves through the scholarly community working on business

94. CENTER FOR ECONOMIC AND SOCIAL RIGHTS, *Human Rights Caucus Reaction to the 2030 Agenda for Sustainable Development* (Sept. 23, 2015), http://www.cesr.org/downloads/HR_Caucus_Reaction_Agenda2030.pdf.

95. Tom Mackall, *Limiting the Application of the Treaty to Certain Corporate Entities Could Leave Victims Without Access to Remedy*, <http://business-humanrights.org/en/limiting-the-application-of-the-treaty-to-certain-corporate-entities-could-leave-victims-without-access-to-remedy> (last accessed 2/9/2016).

96. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

97. Mirela V. Hristova, *The Alien Tort Statute: A Vehicle for Implementing the United Nations Guiding Principles for Business and Human Rights and Promoting Corporate Social Responsibility*, 47 U.S.F. L. REV. 89 (2012). Hristova's analysis is based on the 2010 2nd Circuit *Kiobel* decision, not the Supreme Court opinion. For a discussion on pre-*Kiobel* trends in ATS litigation, see Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 BERKELEY J. INT'L L. 456, 461 (2011). Drimmer and Lamoree note that "some two-dozen industries in total have been the subject of one or more ATS lawsuits," indicating widespread use of the ATS to reach corporate behavior overseas. *Id.* at 461.

98. *Id.*

and human rights, and the status of human rights claims against corporations under the ATS.⁹⁹

VI. THE INTERNATIONAL ENVIRONMENT IS IN FLUX

The liability environment for business entities and human rights is in flux—although decisions in U.S. courts have limited extraterritorial human rights tort claims, litigation is proceeding in other countries.¹⁰⁰ Even in the absence of international consensus, there may still emerge an increased risk to companies, even franchises, that developments in national law will create uneven liability across different markets.

There are several cases currently at large in Canadian courts premised to varying degrees on extraterritorial human-rights based tort liability.¹⁰¹ On labor issues,¹⁰² there have also been some developments in Canada, such that even though *Kiobel* precludes U.S. claims, Canada may be an option for individuals harmed in other countries to seek a remedy for their

99. Gwynne L. Skinner, *Beyond Kiobel: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post-Kiobel) World*, 46 COLUM. HUM. RTS. L. REV. 158 (2014–2015); Roger P. Alford, *The Future of Human Rights Litigation after Kiobel*, 89 NOTRE DAME L. REV. 1749 (2013–2014); Ursula Tracy Doyle, *The Evidence of Things Not Seen: Divining Balancing Factors from Kiobel's "Touch and Concern" Test*, 66 HASTINGS L.J. 443 (2014–2015); Sarah Coleman & Jonathan Friedler, *The Road to Reform in the Wake of Kiobel: Multinational Corporations and Socially Responsible Behavior*, 13 J. INT'L BUS. & L. 191 (2014).

100. Stephen R. Layne, *Corporate Responsibility for Human Rights Violations: Redressability Avenues in the United States and Abroad*, 18 GONZ. J. INT'L L. 1 (2014–2015).

101. H. Scott Fairley, *Emerging Liability at Home for Alleged Wrongs Abroad: The Evolving Phenomenon of Transnational Torts*, 2015 NO. 3 RMMLF-INST PAPER NO. 10, 10-6 (2015).

102. Labor rights are a good starting place because they form the closest analogy to general human rights policies. The Universal Declaration of Human Rights specifically talks about the right to work, equal pay, and nondiscrimination in employment. UNITED NATIONS, UNIVERSAL DECLARATION OF HUMAN RIGHTS, Art. 23, http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf. "In the movement toward accountability in global business practices, corporate leaders need to recognize the important premise that labor rights are human rights." Marisa Anne Pagnattaro, *Labor Rights Are Human Rights: Direct Action Is Critical in Supply Chains and Trade Policy*, 10 S.C. J. INT'L L. & BUS. 1 (2013). When companies have domestic human rights policies, they are often aimed at labor practices and discrimination, not anything as esoteric as human trafficking or land rights, or the human right to water. Since so many human rights issues stem from labor rights related to organizing, fair wages, and working conditions, one approach could be to treat franchisors as joint employers in matters of international labor issues. On the issue of labor rights, if U.S. courts lean toward considering franchises joint employers and begin to hold them accountable for wages and labor practices of franchisees, franchisors may have little to lose by way of imposing labor policies internationally that mirror the emerging duty in the US. Also, "[f]ranchise jobs are often viewed as epitomizing a 'low-road' employee-management approach characterized by high turnover and several practices that are deemed unsophisticated, such as low investment in training, deskilling of work, and little encouragement of employee involvement." Peter Cappelli & Monika Hamori, *Are Franchises Bad Employers?*, 61 INDUS. & LAB. REL. REV. 147 (2008). As such, I would argue they may be more susceptible to abuse since their workforces are lower-paid and lower-resourced.

harm.¹⁰³ Denmark, too, has been working to allow extraterritorial human rights claims in its courts.¹⁰⁴ In Kenya, Coca-Cola has settled on cases that have arisen out of bottling contracts.¹⁰⁵ Brazil has been conducting inquiries into McDonald's practices, and unions in Brazil are developing litigation strategies against McDonald's franchises on labor issues.¹⁰⁶ McDonald's is one of the most visible targets for human rights suits related to labor and franchises; even now, in a world without a treaty and with little access to U.S. courts, McDonald's is facing litigation concerning its labor practices.

Although U.S. courts have in the past held that franchisors are not liable for the human rights violation of their franchisees, human rights responsibilities nonetheless add another layer to a franchisor's risk management strategy. As States consider adopting stricter laws addressing supply chain transparency and human rights obligations of corporate actors, franchisors need to consider whether their franchise agreements maintain sufficient separation between themselves and their franchisees to avoid vicarious liability in a given State.

103. Global Business Initiative on Human Rights and Institute for Human Rights and Business, *supra* note 49.

Non-Canadian workers are increasingly suing their employers in Canadian courts for human rights violations allegedly committed outside Canada by the companies themselves or by other entities in their supply chains. This development seems to be spurred by recent U.S. cases limiting the rights of workers and their representatives from bringing these claims in the United States.

John Kloosterman, Trent Sutton, Sari Spinger & Lavanga Wikekoon, *International Norms as the Standard of Care in Negligence Claims Against Multinational Corporations Operating Overseas*, LITTLER (Sept. 16, 2015), <https://www.littler.com/publication-press/publication/canada-foreign-workers-see-use-international-norms-standard-care>.

104. Kendal Human Rights Consulting, *CSR and Extraterritorial Jurisdiction—International Law Boundaries To Human Rights Litigation* (Feb. 2014), <http://um.dk/en/~media/UM/English-site/Documents/Danida/Partners/Research-Org/Research-studies/CRS%20and%20Extraterritorial%20Jurisdiction%202014.pdf> (last viewed Sept. 4, 2015).

105. Dalton Nyabundi & Elvis Ondieki, *Coca-Cola given 90 days to pay Busia claimants*, BUSINESS DAILY AFRICA (Dec. 7, 2014), <http://www.businessdailyafrica.com/Corporate-News/Coca-Cola-given-90-days-to-pay-Busia-claimants/-/539550/2548216/-/y7fy97z/-/index.html>.

106. "The company has been under pressure in Brazil since February, when the country's three largest trade unions filed a lawsuit against McDonald's and Arcos Dourados, accusing it of 'social dumping'—widespread and systematic labour abuses." Bruce Douglas, *McDonald's Faces Global Scrutiny at Brazilian Senate's Human Rights Hearing*, THE GUARDIAN (Aug. 20, 2015), http://www.theguardian.com/world/2015/aug/20/mcdonalds-brazil-human-rights-committee-hearing?CMP=share_btn_tw.

VII. PROS AND CONS OF A TREATY

With limited access to U.S. courts, a treaty may encourage other States to open their courts to claims of human rights violations;¹⁰⁷ one possible view is that the limitation on accessibility for extraterritorial claims in the U.S. could make an international treaty all the more important. The European Parliament supports the need for a binding instrument,¹⁰⁸ and if large, modern economies like in the Euro Zone are prepared to accept and ultimately implement a treaty, U.S. franchisors will likely pay some notice. That said, unless national courts revise their corporate legal codes, franchise relationships may still be too remote to invoke liability.

Faced with a volatile environment, the benefit of a treaty would be that it would make human rights liability rules uniform internationally, removing the uncertainty about whether the same franchise agreement with a Brazilian owner could result in a different liability risk than the same agreement would pose in the United States. A treaty could change the rules of corporate liability by creating international law that requires the adoption of new rules of corporate law in States signatory to the agreement. As it stands, international franchisors may need to conduct comparative analysis of all of the countries in which they operate, since the duties and liabilities of corporations are themselves a creature of law. Ultimately, it might be easier for businesses to have a treaty that lays out the rules and simplifies the duties of franchises.

Notwithstanding arguments in favor of a treaty, a treaty may or may not change anything. If a treaty specifically targets only TNCs, franchise owners could try to claim the same exemptions as domestic companies, arguing they are owned and operated locally. This will ultimately be a question for national courts to determine, unless other nations open their courts to extraterritorial human rights claims. However, even with a treaty, franchisors may be able to pass liability off onto franchisees.

VIII. COULD *KIOBEL* BE A BLESSING IN DISGUISE?

If U.S. courts were the only consideration, *Kiobel* could be a blessing in disguise for those seeking greater voluntary human rights interventions

107. See Amnesty International, *supra* note 48 (discussing litigation options in a variety of countries).

108. EUROPEAN COALITION FOR CORPORATE JUSTICE, *Event Summary: Towards a Legally Binding Instrument on Business and Human Rights*, European Parliament (Sept. 2015), <http://business-humanrights.org/sites/default/files/documents/Summary%20of%20EP%20Event%20on%20UN%20Treaty.pdf>.

from franchisors. Although *Kiobel* limits access to judicial remedies, that limiting may itself open up space for business entities to develop more robust human rights policies for franchisees precisely because of the lesser chance of being hailed to court in the U.S. if the franchisees violate those policies. In the absence of that risk for claims originating outside the U.S., franchisors can treat their franchisees more like they treat their suppliers, and increase the human rights due diligence requirements of those franchisees through their franchise agreements with those franchisees.

Despite objections that the franchise relationship inhibits the implementation of human rights policies,¹⁰⁹ franchisors can currently impose whatever human rights policies they want, and even enforce them, without fear of liability for the employment practices of their franchisees because liability for human rights violations will be subject to a territorial, not agency-related, analysis in U.S. courts under *Kiobel*. In establishing this territorial, as opposed to agency-related, analysis, *Kiobel* may have so limited human rights claims against corporations abroad under the ATS as to render the liability concerns of international franchisors effectively moot. Yes, traditional American agency law might see these policies as moving into significant control, but as long as the violations by international franchisees are occurring abroad, the elements of the *Kiobel* touch and concern test are not likely to be satisfied and the franchisor will be shielded from liability notwithstanding their greater involvement in the setting of human rights policies and requirement of increased due diligence.¹¹⁰ Franchises may even be able to take the caveat about labor practices in other countries out of their human rights policies, and instead reach into franchisee employment practices a little more without risking liability in U.S. courts—the focus of the touch and concern test on the territory of the U.S., and not on questions of traditional common law agency, may mean that as long as the franchisors are violating human rights abroad, the franchisor might be insulated.

Franchisors may have some constraints in their ability to monitor the daily labor practices of their franchisees abroad, but that is not any less

109. MCDONALD'S CORP., *supra* note 18.

110. “[I]f all the relevant conduct occurred abroad, that is simply the end of the matter under *Kiobel*.” *Balintulo v. Daimler AG*, 727 F.3d 174, 190 (2d Cir. 2013). The Second Circuit also notes that the Supreme Court stated in dicta that, even when claims brought under the ATS “touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.” *Id.* “On the other hand, there could be a different outcome if some of the relevant conduct occurred in the United States. Whether such conduct might include corporate decisions here to engage in tortious activity abroad remains to be seen.” Gregory H. Fox & Yunjoo Goze, *International Human Rights Litigation After Kiobel*, 92 MICH. B.J. 44, 46 (2013).

true for human rights than for the product or the menu or the color scheme, and yet franchises do specify the other items. The question still remains how to motivate franchisors to disseminate human rights due diligence practices along with directions on how to build a Big Mac.

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